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No. 93-1893

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Cross-Petitioners,

v.

C. I. STROUD, J. M. SMITH, and ALFRED E. MORRIS, Individually,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING, CONTRARY TO PRIOR DECISIONS OF THIS COURT, THAT THE QUESTION OF WHETHER A SUPERVISOR'S FAILURE TO INVESTIGATE SERIOUSLY A SERIES OF COMPLAINTS ABOUT A TROOPER'S USE OF EXCESSIVE FORCE CONSTITUTES MERE NEGLIGENCE OR DEMONSTRATES DELIBERATE INDIFFERENCE IS NOT A QUESTION FOR THE JURY TO DECIDE?

II. DID THE COURT OF APPEALS ERR IN HOLDING, CONTRARY TO PRIOR DECISIONS OF THE FOURTH CIRCUIT AND OTHER CIRCUITS, THAT AN OFFICIAL WHO KNEW OR SHOULD HAVE KNOWN THAT HE WAS COMMITTING A CONSTITUTIONAL VIOLATION IS ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY BY MERELY CLAIMING THAT HIS ACTIONS FOLLOWED THE "STANDARD OPERATING PROCEDURES" OF HIS AGENCY?

III. DID THE COURT OF APPEALS ERR BY REFUSING TO RECOGNIZE A FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHT OF FAMILY MEMBERS TO ENJOY THE LOVE AND SUPPORT OF THEIR HUSBAND AND FATHER WITHOUT UNJUSTIFIED GOVERNMENTAL INTRUSION, IN DIRECT CONFLICT WITH THE THIRD, SEVENTH, NINTH AND TENTH CIRCUITS WHICH HAVE EXPLICITLY RECOGNIZED SUCH A CONSTITUTIONAL RIGHT IN THESE CIRCUMSTANCES?

LIST OF PARTIES

Petitioner C. I. Stroud, a Sergeant in the North Carolina Highway Patrol.

Respondents and Cross-Petitioners Deborah Shaw, Administratrix of the Estate of Sidney Bowen, Deceased; and Nancy Bowen, individually and as guardian ad litem for Kimberly Yvonne Bowen and Lee Frederick Bowen, who are Sidney Brown's wife and two minor children.

Cross-Respondents J. A. Smith, a Sergeant in the North Carolina Highway Patrol and A. E. Morris, a trooper for the North Carolina Highway Patrol.

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DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as Guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

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OPINION BELOW

The Fourth Circuit's opinion in this case is *Shaw v. Stroud,* 13 F.3d 791 (4th Cir. 1994), and is reproduced in the appendix to the Petition for Certiorari filed herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 6, 1994. The Court of Appeals denied a petition for rehearing on February 25, 1994. This Cross-Petition is filed pursuant to the provisions of Rule 12.3 of the Rules of the Supreme Court of the United States. The Petition for Writ of Certiorari was received by counsel for Respondent on May 31, 1994.[1] Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

2. 42 U.S.C. §1983 (set out in Petition for Writ of Certiorari at App. 73).

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[1]The Certificate of Service states that the petition was mailed on May 26, 1994. Counsel for Respondent did not receive it until the 31st because the intervening days included a weekend and the Memorial Day holiday.

STATEMENT OF THE CASE

This Cross-Petition seeks review of that portion of the lower court's opinion which affirmed the grant of summary judgment in favor of Sergeant J. M. Smith on the merits and affirmed the holding that Sergeant Smith is entitled to qualified immunity. Sergeant Smith was Trooper Morris' supervisor at the time of the incident at issue. Smith was made aware of Morris' violent tendencies on several occasions, once by a sitting county district court judge. A line sergeant reported to Smith that

> Judge Gore states that he is very concerned that Trp. Morris is having case after case involving the use of physical force on defendants. Judge Gore states that in his opinion a lot of these cases are a result of excessive force being applied. Judge Gore states that he is being informed from several lawyers that excessive force is being applied to their clients from Trp. Morris. Judge Gore went on to say that he feels that it is only a matter of time before Trp. Morris seriously injures a person and Trp. Morris and the H.P. [Highway Patrol] will be sued. Judge Gore stated that it seems that most of the cases he refers to involve blacks or people of lower means. Judge Gore stated he likes Trp. Morris but feels bound by his position to inform us of this problem. J.A. 447[2]. *Shaw v. Stroud*, 13 F.3d 791 at 805 (4th Cir. 1994).

In addition, reports were made to the same line sergeant that Morris had pulled over a citizen in South Carolina and forced him at gunpoint to return to North Carolina to be arrested. During a scuffle following the

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[2]J.A. refers to the Joint Appendix filed in the Fourth Circuit Court of Appeals.

arrest, the arrestee suffered broken ribs and a broken foot. *Shaw,* 13 F.3d at 806. Finally, just three weeks before Morris shot Bowen, Morris met Smith at the hospital with an arrestee of his who was injured during his arrest for drunken driving. Smith, the dissent said, "had the power, responsibility, and opportunity to put a stop to Morris' conduct." *Shaw,* 13 F.3d 791. Summary judgment in his favor was improper because a reasonable jury could find that Smith was deliberately indifferent.

In addition, the individual plaintiffs, Nancy Bowen and her two children, [hereinafter "The Bowen Family"] seek review of the Fourth Circuit Court of Appeals decision in this case to go against the weight of precedent in other circuits in declining to recognize a cause of action for the violation of the Bowen Family's Fourteenth Amendment due process rights which occurred in these circumstances.

Of particular relevance to this Cross-Petition procedurally is the fact that after Stroud appealed the denial of his summary judgment motion on the qualified immunity defense, Deborah Shaw, Administratrix of the Estate of Sidney Bowen, [hereinafter referred to as "Bowen's Estate"], and the Bowen Family, filed a motion pursuant to 28 U.S.C. §1292(b) seeking certification of additional issues to be heard by the Court of Appeals. The district court granted this motion on September 4, 1992 (Appendix to Cross Petition) and the Court of Appeals issued an order permitting appeal of the interlocutory order on October 16, 1992. (Appendix to Cross Petition). Thus, the question of the district court's granting of qualified immunity and summary judgment on the merits to Sergeant Smith and the substantive due process claim were properly before the Court of Appeals. *See Shaw v.*

Stroud, 13 F.3d 791, 798 (4th Cir. 1994), Petition for Writ of Certiorari at App. 12, [hereinafter "Pet. App."]. Judge Hall, dissenting in part from the majority opinion below, would have reversed the grant of summary judgment for Smith. *Shaw,* 13 F.3d at 805; Pet. App. 26.

REASONS FOR GRANTING THE WRIT

This case should be remanded for trial, for all of the reasons detailed in Respondent's Brief in Opposition filed herein. However, if the Petition for Certiorari is granted, the Court should also grant this conditional cross petition so that it may review the entire judgment of the Court of Appeals as it relates to the application of principles of supervisory liability under 42 U.S.C. §1983 to the particular circumstances of this case. In addition, the Court of Appeals declined to recognize a Fourteenth Amendment due process right to family association, which directly conflicts with the majority of the other circuit courts which have recognized such a right.

If the Court grants the Petition to review Sergeant Stroud's supervisory liability, issues relating to the lower court's analysis of Sergeant Smith's supervisory liability should also be reviewed. The majority opinion below raises two issues relating to Sergeant Smith: (1) Whether a reasonable jury could conclude that Sergeant Smith was deliberately indifferent to a known risk of harm; and (2) Whether a supervisor who knew he was committing a constitutional violation is entitled to qualified immunity simply because he claims to have followed his agency's standard operating procedure.

I.

A FULL AND FAIR CONSIDERATION OF SUPERVISORY LIABILITY IN THIS CASE REQUIRES REVIEW OF THE LIABILITY OF BOTH OF TROOPER MORRIS' SUPERVISORS.

The central issue raised by the Petition for Certiorari is whether one or both of Trooper Morris' supervisors were deliberately indifferent to Morris' pattern of using excessive force and therefore responsible for the death of Sidney Bowen. Taken together, the majority opinion and the dissent below found Sidney Bowen's death was caused in part by the deliberate indifference of Trooper Morris' supervisors in the face of Morris' repeated pattern of using excessive force with arrestees, most of whom were "blacks or people of lower means." *Shaw v. Stroud,* 13 F.3d at 805-06. The string of thirteen prior incidents of Morris' use of excessive force began with a beating he administered in October, 1986, while Sergeant Stroud was his supervisor, and continued after Sergeant Smith took over in November, 1988, with the last known incident occurring just three weeks before Sidney Bowen was killed. Likewise, Morris' pattern of issuing disproportionate numbers of citations for resisting arrest and assault on an officer was apparent throughout the entire period. Both supervisors were made aware of various complaints about Morris' use of force and about the injuries that arrestees received while in his custody.

As the majority of the Fourth Circuit pointed out, when Stroud was notified of repeated assaults by Morris, Stroud "responded callously and with apparent amusement." *Shaw,* 13 F.3d at 800. Sergeant Stroud was clearly aware of Morris' violent propensities. Judge

Hall, dissenting from the majority opinion below, similarly pointed out Sergeant Smith's failings. Though Stroud did not provide any information to Smith about Morris' history, Smith had personal knowledge of several instances in which Morris used excessive force during his relatively short time as sergeant. *Shaw*, 13 F.3d at 805-06.

The majority below allowed the case to proceed against Stroud but not against Smith primarily because there was direct evidence of Sergeant Stroud's deliberate indifference while Sergeant Smith took some action to monitor the situation. 13 F.3d at 801. In contrast, the dissent argued that Stroud could not be liable because his transfer and the resulting 15 month gap between his supervision and Sidney Bowen's death breaks the causal link, but that the evidence was such that a reasonable jury could conclude that Smith was deliberately indifferent. 13 F.3d at 805-07.

In order for this Court appropriately to review the issue raised in Stroud's position, this cross-petition concerning Sergeant Smith's liability must also be granted. While Bowen's Estate maintains that both supervisors are liable, if the Court were to agree with the opinion of the dissenting Judge below, appropriate relief could not be granted unless the issues raised in this cross petition are also before the Court. Granting the petition in this case without granting the conditional cross petition would put Bowen's Estate in the position of being unable to proceed against Smith even if the Court decides that Smith, not Stroud, is the responsible supervisor. Similarly, if the Court were to agree with Bowen's Estate that, in light of the evidence as viewed most favorably to it, a reasonable jury could conclude that both Stroud and Smith were deliberately indifferent and that thereby they both are

responsible in part for Sidney Bowen's death, granting this cross petition is necessary to put the issue of Smith's liability before the Court and to give the Court the opportunity to remand the case with suitable directions to proceed on that basis. None of the total of four Judges who have reviewed the full record of evidence in this case has concluded that both of Morris' supervisors should avoid trial, yet that would be a potential result if this Court were to grant the petition without also granting the cross petition.

Indeed, the fact that consideration of Stroud's liability in this case is inextricably linked to questions concerning Smith's supervision of Morris is further demonstrated by Petitioner's second argument that the intervening supervision of Sergeant Smith insulates him from liability in this case. Stroud maintains that since Smith's supervision was constitutionally adequate it has a curative effect on Stroud's unconstitutional deliberate indifference and breaks the causal connection between his inaction and Sidney Bowen's death. Petition for Writ of Certiorari at 13-14. Bowen's Estate contends that Smith was deliberately indifferent, a fact that was reasonably foreseeable by Stroud, and therefore Smith's misconduct does not remove Stroud as a proximate cause of Bowen's death.

In the circumstances of this case, the issue presented in the petition directly raises questions concerning the liability of Sergeant Smith. If the petition is granted, this cross petition should also be granted to give the court the ability to consider fully the entire controversy concerning supervisory liability.

II.

THE COURT BELOW SHOULD HAVE ALLOWED A JURY TO DETERMINE WHETHER SERGEANT SMITH WAS DELIBERATELY INDIFFERENT INSTEAD OF DECIDING THIS FACTUAL ISSUE ITSELF.

The court below made a factual determination about Smith's behavior:

> Although Smith's actions may not have been the most effective and although he might have done more, such a rule is not the standard by which we judge Smith's conduct. In short, Smith simply did not exhibit the "tacit authorization" of or "deliberate indifference" to constitutional injuries required for §1983 supervisory liability. *Shaw,* 13 F.3d 791.

If the Court grants the petition to review Stroud's liability for his deliberate indifference, the Court should also review the Fourth Circuit's error in concluding that Smith is entitled to summary judgment on the merits of the Fourth Amendment claim. The issue of deliberate indifference is a question for the jury. See *City of Canton v. Harris,* 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989). Here, contrary to the teaching of *Canton,* the court below made its own finding of fact rather than allowing the jury to determine whether Smith exhibited the level of tacit authorization necessary for supervisory liability. 13 F.3d at 801; Pet. App. 17-18.

The task of the reviewing court on a motion for summary judgment is to take one step back and ask whether there is a genuine issue for trial, rather than come to its own conclusion about the weight and sufficiency of the evidence. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 149, 106 S.Ct. 2505, 91 L.Ed.2d

202 (1986). The evidence of the non-moving party is to be believed and all justifiable inferences from that evidence are to be drawn in their favor. *Matsushita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). As this Court reiterated in a more recent decision:

> Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. ___ , 119 L.Ed.2d 265, 112 S.Ct. 2072 (1992). The reasonableness of inferences from the evidence in this case favorable to Bowen's Estate is demonstrated by Judge Hall's discussion of the facts concerning Smith's supervision in his dissenting opinion in the court below. *See Shaw,* 13 F.3d at 805-06; Pet. App. 26-28.

Whether a supervisor acts with deliberate indifference towards a known risk of harm is a question of intent which does not need to be proven by direct evidence. *See Bostic v. Wall,* 588 F.Supp. 994 (D.C.N.C. 1984). Bowen's Estate's evidence in this case demonstrates directly that Smith did have knowledge of allegations that Trooper Morris was using excessive force on numerous occasions. Reliable and responsible parties told Sergeant Smith about serious problems with Morris' use of force on arrestees, including a state court Judge and a local attorney.

Smith did not request an internal affairs investigation, as is required by the standard operating procedures of the North Carolina Highway Patrol, when he was told that one of his Troopers may be violating the law. Smith did not make any attempt to find out when and where these

violations might have taken place and who the victims were. Smith did not interview any of the persons injured during the course of their arrest by Trooper Morris. Smith did not look at any hospital records. In fact, three weeks before Sidney Bowen was killed, Smith learned that a Morris arrestee had allegedly fractured his skull on the vent shade of a patrol car and Smith apparently found nothing unusual or surprising about that, since no investigation of the incident is initiated.

Throughout the period from December, 1988, until Sidney Bowen was killed on February 27, 1990, Smith's only action in response to all of the information demonstrably available to him concerning Trooper Morris' behavior was to ride with Morris in the patrol car twice, send a sergeant to hear the evidence relating to criminal charges in one case where an arrestee was injured, and discuss the complaints by the local judge and attorney with his commander. As Judge Hall commented: "[f]rom these series of facts, a jury could reasonably find that Smith's inertia was deliberate." *Shaw*, 13 F.3d at 806, Pet. App. 28. Smith's response makes about as much sense as a police officer responding to information that Joe Jones had committed a string of bank robberies by riding around with Jones on two occasions to see if he does it again. The fact that the panel below did not agree on the inferences to be drawn from plaintiff's evidence is certainly an indication that the evidence creates a genuine issue for trial. The majority erred in substituting its own deliberations for those of the jury yet to be empaneled in this case and this Court should correct that error.

III.

WHERE A GOVERNMENT OFFICIAL KNOWS OR SHOULD KNOW THAT HE IS COMMITTING A CONSTITUTIONAL VIOLATION, HE IS NOT ENTITLED TO QUALIFIED IMMUNITY SIMPLY BECAUSE HE FOLLOWED STANDARD OPERATING PROCEDURES.

The court below held that even if Sergeant Smith was deliberately indifferent to a known risk of harm because he knew about Trooper Morris' repeated use of excessive force when faced with suspects or arrestees who demonstrated verbal or physical resistance to his authority, and did nothing more than what the dissent characterized as an "ostrich-like" investigation, he is still entitled to qualified immunity from suit. *Shaw,* 13 F.3d at 802-03, 806, Pet. App. 21. The court found that during the relevant time period, the law was clearly established, both in terms of what degree of force amounted to unconstitutional excessive force and in terms of what action or inaction would result in supervisory liability. *Id.* at 801. However, Smith was granted qualified immunity because a reasonable officer could have believed that by following standard operating procedures he was acting lawfully. *Id.* at 803.

The reality is that Smith failed to follow standard operating procedures, while claiming to follow it. The policy of the North Carolina Highway Patrol requires that an internal affairs investigation be initiated any time information comes to the attention of any member of the patrol that another member is violating any rules and regulations, but Smith had such information and did not initiate an internal affairs investigation.

In any case, the court below compounded the factual error of concluding that Smith had followed standard procedures when he did not, by applying a fallacious rule

of law. Simply following agency or departmental policy in any particular circumstance does not guarantee an official qualified immunity. The policy itself may be unconstitutional on its face, *see e.g., Weber v. Dell,* 804 F.2d 796, 802 (2nd Cir. 1986), or it may be that the agency's failure to have an adequate policy leads to the constitutional violation. *See e.g., City of Canton v. Harris,* 489 U.S. 378, 390-91, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Spell v. McDaniel,* 824 F.2d 1380, 1387-91 (4th Cir. 1987). In either circumstance, the individual officer may indeed be following standard operating procedures yet violating citizens' constitutional rights. Courts have repeatedly held individual officers liable even when their city was also held liable for maintaining unconstitutional policies. For example, in *Fields v. City of South Houston,* 922 F.2d 1183 (5th Cir. 1991), the Fifth Circuit held that a police officer was not entitled to qualified immunity despite the fact that he was following a city policy when he held a suspected drunk in custody without providing medical attention. See also: *Black v. Stephens,* 662 F.2d 181 (3rd Cir. 1981) (individual officer found liable for use of excessive force; chief and city also liable for policy of encouraging use of excessive force); *Clipper v. Takoma Park, Md.,* 876 F.2d 17 (4th Cir. 1989); (individual officer held liable for making arrest without probable cause; city also liable for policy of allowing same); *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985), *cert. denied,* 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987) (officers liable for excessive force in wrongful death; city also liable for inadequate training); *Jackson v. Elrod,* 881 F.2d 441 (7th Cir. 1989) (individuals not entitled to qualified immunity for following policy of banning all hard-

back books from inmates even where it was prison standard operating procedure).

By focusing on whether Smith was following standard operating procedures, the court below answered the wrong question and applied the wrong legal standard. The appropriate inquiry on a motion for qualified immunity is well-established. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Anderson v. Creighton,* 438 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The question is whether in light of all of the circumstances, Smith reasonably could have believed that his actions were constitutional. Given the justified inference from the evidence that Smith was, in fact, deliberately indifferent, a reasonable officer could not have believed that by turning a blind eye to Morris' abuses he was acting constitutionally. As the dissent noted: "Judge Gore's warning had to be perceived as extraordinary, and should have set off a serious investigation." *Shaw,* 13 F.3d at 806. A reasonable supervisor could not have believed that Smith's deliberately ineffective response to this complaint was lawful. This Court should review this case so that it can apply the correct standard and deny Smith the shield of qualified immunity in this case.

IV.

THE FOURTH CIRCUIT, CONTRARY TO THE LAW IN ALMOST EVERY OTHER CIRCUIT, ERRED IN REFUSING TO RECOGNIZE THE BOWEN FAMILY'S SUBSTANTIVE DUE PROCESS RIGHTS IN THESE CIRCUMSTANCES.

The Fourth Circuit, in its opinion in this case, declined to recognize a substantive due process claim under §1983 for family members of an injured party based on the constitutional liberty interest of intimate association. *Shaw,* 13 F.3d 791. See also, *Rucker v. Harford County, Md.,* 946 F.2d 278, 282 (4th Cir. 1991), *cert. denied,* 112 S.Ct. 1175 (1992). The majority of circuits which have addressed this issue have recognized such due process rights and constitutional claims under §1983. *See Estate of Bailey by Oare v. York County,* 768 F.2d 503 (3rd Cir. 1985); *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984); *Smith v. City of Fontana,* 818 F.2d 1411 (9th Cir. 1987), *cert. denied,* 108 S.Ct. 311, 484 U.S. 935, 98 L.Ed.2d 269 (1987); *Trujillo v. Bd. of Cty. Com'rs of Cty. of Santa Fe,* 768 F.2d 1186 (10th Cir. 1985). Two circuits, along with the Fourth Circuit, have declined to recognize such claims. *See Valdivieso Ortiz v. Burgos,* 807 F.2d 6 (1st Cir. 1986); *Harpole v. Arkansas Department of Human Services,* 820 F.2d 923 (8th Cir. 1987). The Fifth and Sixth Circuits have specifically declined to address the issue, holding that state wrongful death statutes provided the necessary relief. *Rhyne v. Henderson Cty.,* 973 F.2d 386 (5th Cir. 1992); *Purnell v. Campbell,* 925 F.2d 941 (6th Cir. 1991). There is a clear conflict among the circuits as to whether claims for constitutional violations of familial associations can be brought under §1983. This conflict has caused confusion and disagreement among the lower courts. "The right to such recovery under

§1983 has 'generated considerable confusion and disagreement', over which the circuits have divided." *Rhyne* at 390.

The Court should consider this issue so that federal law will be uniform throughout the circuits. In addition, the claim is well supported by the legislative history of §1983's precursor,[3] and by long-standing Supreme Court decisions concerning the importance of maintaining family integrity free of interference by the state. The legislative history of the Ku Klux Klan Act of 1871 attests to the fact that it was meant to create a remedy for the destruction of family relationships by illegal, racially-motivated violence. One of the Act's proponents stated:

> This then is what we offer to the people of the United States as a remedy for wrongs, arsons and murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy.

Cong. Globe, 42nd Cong., 1st Sess. 806 (Representative Butler). Rather than being an extension of the law, this type of claim was intended by those who enacted the means for a remedy under §1983.

The rights of Sidney Bowen's wife and children to recover under §1983 for the unlawful breach of the fam-

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[3] 42 U.S.C. §1983 was derived from section 1 of the Civil Rights Act of 1871 (also referred to as the Ku Klux Klan Act of 1871). Congress enacted §1983 pursuant to its power under §5 of the Fourteenth Amendment to make appropriate laws to enforce that amendment. *Quern v. Jordan*, 440 U.S. 332, 351 n.3, 355, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (Brennan, J., concurring).

ily relationship is further supported by the Supreme Court decisions recognizing that there is a "private realm of family life which the state cannot enter." *Moore v. East Cleveland,* 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (*quoting Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944)); *Wisconsin v. Yoder,* 406 U.S. 205, 232-33, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Just as state officials are liable for damages for taking children away from their parents without due process, *see, e.g., Duchesne v. Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977) (mother has cognizable claim under §1983 for seizure of her children without hearing or court order), state officials, acting under color of law similarly should be held liable for permanently taking a husband away from his wife and a father away from his children.

Congress intended to allow survivors to sue under §1983 for the harm suffered from the murders of their loved ones. Nancy, Kimberly and Frederick Bowen claim that Morris' actions constituted unwarranted state interference with their rights to familial companionship and society. This Court should recognize this constitutional right in these circumstances, resolve the conflict among the circuits, and reverse the lower court's grant of summary judgment to Defendant Morris on this claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the Petition For Writ Of Certiorari in No. 93-1893, then it should also grant this conditional cross petition for a writ of certiorari.

Respectfully submitted,

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June 30, 1994

CERTIFICATE OF SERVICE

I, James E. Ferguson, II, do swear or declare that on this date, the 30th day of June, 1994, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Respondents' Brief In Opposition on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing in an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage prepaid.

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APPENDIX A

[Filed SEP 04 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

No. 91-18-CIV-7-BR

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, deceased, and NANCY BOWEN, individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Plaintiffs,

v.

ALFRED E. MORRIS; C.I. STROUD, and J.M. SMITH, in their individual capacities,

Defendants.

ORDER

This action was instituted seeking compensatory and punitive damages arising out of the death of Sidney Bowen. Named as defendants were Alfred E. Morris, a North Carolina state trooper who shot Sidney Bowen, and C.I. Stroud and J.M. Smith, who served as supervisors over Morris. In an order dated 5 August 1992 the

court ruled on motions for summary judgment and other motions which were pending at that time.

As a result of rulings made by the court in that order, the action was dismissed as to defendant J.M. Smith. And, although some claims against defendants Morris and Stroud were dismissed, others were left for disposition. In particular, the court denied the qualified immunity defense asserted by defendant Stroud in his motion for summary judgment. As he was entitled to do, defendant Stroud gave notice of appeal from that decision to the United States Court of Appeals for the Fourth Circuit. The case is currently set for trial on 24 September 1992.

Now pending before the court are the following motions:

1. By defendant Morris to sever.

2. By plaintiffs seeking certification under 28 U.S.C. §1292(b) of additional issues to be heard by the Court of Appeals or, in the alternative, for final judgment on dismissed claims under Rule 54(b) of the Federal Rules of Civil Procedure.

Upon full considerationof the arguments presented, the motion of defendant Morris is denied and the motion of plaintiffs is allowed.

The court notes that by order dated 27 August 1992, upon motion of defendant Stroud, it certified the 5 August 1992 order, as it pertains to defendant Stroud, in its entirety.

The court now certifies that the following matters covered by its order involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of this litigation:

A. The grant of summary judgment for defendant Smith on the grounds of qualified immunity with respect to plaintiffs' 42 U.S.C. §1983 claim under the Fourth Amendment;

B. The grant of summary judgment on plaintiffs' negligent infliction of emotional distress claim; and,

C. The grant of summary judgment on plaintiffs' 42 U.S.C. §1983 claim asserting substantive due process rights.

The trial is hereby continued until further order of the court.

This 3 September 1992.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

APPENDIX B

[Filed October 16, 1992]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-8075
CA-91-18-7-BR

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, deceased; NANCY BOWEN, Individually, and as guardian ad litem for Kimberly Yvonne Bowen and Lee Frederick Bowen, the minor children of Sidney Bowen

Petitioners,

v.

ALFRED E. MORRIS; C. I. STROUD, Individually; J. M. SMITH

Respondents

ORDER

Petitioners have filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b). Respondent Alfred E. Morris has filed a motion for leave to file his answer to petition out of time.

The Court grants the petition for permission to appeal. The Court also grants respondent's motion for leave to file his answer out of time.

Entered at the direction of Judge Hall, with the concurrence of Judge Ervin and Judge Murnaghan.

FOR THE COURT

/s/ Bert M. Montague
CLERK

Supreme Court, U.S.
FILED
AUG 2 1994
OFFICE OF THE CLERK

No. 94-9

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Cross-Petitioners,

v.

C.I. STROUD, J.M. SMITH, and ALFRED E. MORRIS, Individually,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS-RESPONDENTS BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

I. CAN DELIBERATE INDIFFERENCE BE SHOWN BY INFERENCES OR BY CONTENDING AN ALTERNATIVE METHOD OF INVESTIGATION BY A SUPERVISOR INTO A TROOPER'S ALLEGED USE OF EXCESSIVE FORCE WOULD HAVE BEEN MORE APPROPRIATE?

II. WOULD A REASONABLE SUPERVISOR, IN LIGHT OF CLEARLY ESTABLISHED LEGAL RULES, BELIEVE FOLLOWING STANDARD OPERATING PROCEDURES, MAKING RECORDS OF INFORMAL COMPLAINTS, MONITORING A TROOPER'S ACTIONS, AND REPORTING UP THE CHAIN OF COMMAND WAS LAWFUL SUPERVISION?

III. SHOULD THIS COURT EXTEND THE PROTECTIONS OF SUBSTANTIVE DUE PROCESS TO CLAIMS BASED ON GOVERNMENTAL ACTION WHICH INCIDENTLY AFFECTS THE FAMILY RELATIONSHIP WHEN THE ISSUE IS MOOT IN THIS CASE?

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No. 94-9

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Cross-Petitioners,

v.

C.I. STROUD, J.M. SMITH, and ALFRED E. MORRIS, Individually,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The plaintiffs have filed a cross-petition seeking review of the lower court's decision granting summary judgment to First Sergeant J.M. Smith both on the merits and

based on qualified immunity from liability. A second basis of the cross-petition is the granting of summary judgment for all defendants on a substantive due process claim.

The procedural history of this matter is set forth in the petition for writ of certiorari. The representations of the cross-petitioners as to the facts relating to First Sergeant Smith are misleading as there were additional uncontested facts which have a bearing on the questions presented in the cross- petition.

Trooper Alfred E. Morris joined the North Carolina State Highway Patrol in 1983 and, after completing a four and one-half month basic school, was assigned to Columbus County. (J.A. 161,162). In December, 1988, First Sergeant J.M. Smith was assigned to that county as a second line supervisor. (J.A. 213). The death of Sidney Bowen, which gave rise to this action, occurred in February, 1990. (J.A. 279,280).

Trooper Morris was frequently assigned to work nights and weekends in an area known to have individuals with a propensity to flee and forcefully resist arrest. It is considered one of the worst areas to patrol in the State. (J.A. 210, 211).

Chief District Court Judge William C. Gore, Jr. presided over many trials where Trooper Morris had initiated the charges, and found him to be a hard worker and a dedicated Trooper. (J.A. 251). During May, 1989, several lawyers had spoken to Judge Gore about the amount of force Trooper Morris used against their clients. Without

investigating those allegations, Judge Gore thought the Patrol should be aware of what the defense lawyers were discussing. (J.A. 252). Sergeant White, who was a subordinate of First Sergeant Smith, had spoken to Judge Gore and summarized the meeting on paper for First Sergeant Smith. (J.A. 239,240).

Judge Gore did not wish to file a complaint pursuant to Patrol policy against Trooper Morris, nor did he have any personal knowledge of particular cases the attorneys were discussing. The judge did mention that a defense attorney, Dennis Worley, had spoken to him about an upcoming case with his client, Christopher Hardee. (J.A. 240).

First Sergeant Smith discussed the matter with Sergeant White and Trooper Morris. He sent Sergeant White to monitor the trial of Christopher Hardee. (J.A. 228). First Sergeant Smith discussed the matter with Troop Commander Captain C.V. Parks, and they agreed to monitor Trooper Morris, but in their opinion, it had more to do with the area patrolled than with Trooper Morris. (J.A. 222).

Christopher Hardee was convicted by Judge Gore of driving while impaired and resisting arrest, and Sergeant White found there to be no factual basis to an alleged use of excessive force. (J.A. 241). This was reported back to First Sergeant Smith. On two occasions, First Sergeant Smith rode with Trooper Morris to observe his conduct and saw no need for concern. (J.A. 232).

REASONS FOR DENYING WRIT

The cross-petitioners contend the case against First Sergeant Smith should be reviewed because he was named in the original complaint with the petitioner, First Sergeant Stroud.

The cross-respondents contend the cross-petitioners have failed to allege any proper basis for their petition to be granted as the decision by the lower court complies with the law. The petitioner, First Sergeant Stroud, seeks review of a narrow question of law relating to supervisory liability for a former subordinate's subsequent conduct. The cross-petitioners seek review of summary judgment granted and affirmed below against First Sergeant Smith simply because they were unsuccessful, and neither the facts nor the issue of the cross-petition are related to the question presented in the original petition.

The cross-petitioners also seek review of the granting of summary judgment on their substantive due process claim. Three circuit courts have recognized such a claim, but this issue is moot as the cross-respondents have qualified immunity from liability even if this Court recognizes such a claim.

I. THE CROSS-PETITIONERS HAVE FAILED TO PRESENT A FACTUAL BASIS TO SUPPORT THEIR CLAIM THAT FIRST SERGEANT SMITH WAS LIABLE FOR UNLAWFUL SUPERVISION UNDER 42 U.S.C. § 1983, AND ALTERNATIVE METHODS OF INVESTIGATION INTO A TROOPER'S CONDUCT DO NOT ESTABLISH SUPERVISORY LIABILITY.

The lower court held three elements are necessary to establish liability of supervisors for the alleged constitutional injuries inflicted by their subordinates under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices, and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Shaw v. Stroud,* 13 F.3d 791, 799 (4th Cir. 1994).

Without addressing whether the cross-petitioners' evidence was sufficient to support all of the elements, the lower court found insufficient evidence to support the second element, deliberate indifference or tacit authorization, on the part of First Sergeant Smith and granted summary judgment. *See Shaw* at 801.

When the need for action is known or is so obvious and the inadequacy of action so likely to result in a violation of constitutional rights, a supervisor can be said to be deliberately indifferent to the need. *Farmer v. Brennan,* 62 U.S.L.W. 4446, 4450 (U.S. June 6, 1994), citing *City of Canton*, 489 U.S. 378, 390, n. 10 (1989) (Failure to train officers concering constitutional limitations on the use of deadly force would be deliberately indifferent.) Even when the need for action is known, a supervisor may be free from liability if he responded reasonably to the risk, even if the harm was not averted. *Farmer* at 4451.

The cross-petitioners assume a heavy burden of proof in establishing deliberate indifference. A supervisor's continued inaction in the face of widespread abuses provides a basis for liability. *Slaken v. Porter*, 737 F.2d 368, 372-73 (4th Cir. 1984). The evidence proffered by the cross-petitioners, even under summary judgment standards, was insufficient to show liability. The cross-petitioners cannot simply rest upon mere allegations and inferences. Instead, the non-moving party must adduce specific provable facts which establish that there is a triable issue. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

There is no dispute as to what allegations First Sergeant Smith was aware of concerning Trooper Morris' use of force. The comments of local defense attorneys concerning Trooper Morris' use of force on arrestees was relayed by Judge Gore and eventually to First Sergeant

Smith. Only one individual, Christopher Hardee, and his attorney, Dennis Worley, were named. Neither Judge Gore nor the attorney wished to file complaints with the Patrol, which would have led to a full investigation by the Internal Affairs Section. (J.A. 252, 256). Rudolph Towns was alleged to have suffered a fractured skull during his arrest by Trooper Morris, but never conveyed any complaints to First Sergeant Smith. (J.A. 215, 318).

Nor is there any dispute that First Sergeant Smith took action. First Sergeant Smith discussed Dennis Worley's concerns with Sergeant White who supervised Trooper Morris directly. They monitored the Christopher Hardee case. First Sergeant Smith discussed the matter with his Troop Commander, and it was agreed that Trooper Morris' conduct would be monitored. First Sergeant Smith also rode with Trooper Morris on at least two occasions to observe his conduct. (J.A. 232). This action does not show deliberate indifference or tacit authorization. The facts underlying this case do not warrant review by this Court.

The lower court recognized that although a separate element, in practical terms, a showing of a pervasive and unreasonable risk of harm is also a necessary component of establishing gross indifference. *Shaw* at 799, n. 12. The cross-petitioners failed to present such evidence.

No complaints against Trooper Morris for improper use of force were filed with Internal Affairs during First Sergeant Smith's fifteen months of supervision. The fact that some local criminal defense attorneys discussed concern

about a Trooper's conduct does not lead to the conclusion that constitutional violations have occurred.[1] Christopher Hardee was found guilty by Judge Gore of resisting Trooper Morris, and Sergeant White reported that there was no evidence of improper conduct. (J.A. 306, 241-242). Rudolph Towns made horrific allegations of a fractured skull and permanent injury which are a complete fiction and reiterate the need to distinguish between mere allegations and provable facts.[2] Indeed, the number of complaints bears no relation to their validity. *Brooks v. Scheib,* 813 F.2d 1191, 1193 (11th Cir. 1987) (Officer patrolled high crime area arresting repeat offenders who frequently use citizen complaints to harass officer.)

Furthermore, the number of charges brought by Trooper Morris do not indicate a pervasive and unreasonable risk of harm. This Court has emphasized the danger in relying on numbers alone without the numbers in context. *See Rizzo v. Goode*, 423 U.S. 362, 374-75 (1976). During the time of First Sergeant Smith's supervision, Trooper

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[1] According to First Sergeant Smith, it is not unusual for attorneys to attempt to draw attention away from their client's conduct by claiming police misconduct and perhaps obtaining a favorable plea bargain. (J.A. 228).

[2] Rudolph Towns' complaint against Trooper Morris was dismissed and Rule 11 sanctions imposed because medical evidence did not remotely support the allegations. *Towns v. Morris*, No. 92-7-CIV-7-F (E.D.N.C. Feb. 5, 1993), *appeal pending*, No. 93-1295 (4th Cir. Feb. 26, 1993).

Morris had 3,255 enforcement contacts which led to 1,022 violations, 171 for driving while impaired, 11 for resisting, delaying, or obstructing an officer, and 2 for assault on a law enforcement officer. (J.A. 279-80). Gross indifference to an alleged use of excessive force is not demonstrated by the number of charges issued by Trooper Morris as the cross-petitioners allege. There is no showing of a pervasive and unreasonable risk of harm by issuing assault charges against two of the over 3,000 people with whom Trooper Morris had enforcement contact.

Finally, the cross-petitioners contend First Sergeant Smith should have ignored the statements of Judge Gore and Dennis Worley and requested an Internal Affairs investigation or questioned the thousands of people with whom Trooper Morris had enforcement contact, or consult hospital records. The cross-petitioners cite no authority to support their contention, as indeed there is none. It is inappropriate to conclude injury could have been avoided if supervisors had done more, as such a claim could be made in every case. *See Canton*, 484 U.S. at 391. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (Reasonableness must be judged from the perspective of a reasonable officer at the scene under the totality of the circumstances rather than with the 20/20 vision of hindsight.) *Morrison v. Martin,* 755 F. Supp. 683 (E.D.N.C. 1990) (Fact that less force could have been used is immaterial.) *Belew v. Ruppert,* 694 F. Supp. 1214, 1215 (D. Md. 1988) (The fact some other action by deputy might now seem preferable is immaterial.)

The lower court determined as a matter of law the cross-petitioners failed to present sufficient evidence that First Sergeant Smith was grossly indifferent to alleged constitutional violations. The lower court did not make factual determinations as the cross-petitioners contend, but rather addressed the insufficiency of facts presented. Summary judgment on the merits was properly granted.

II. A REASONABLE OFFICER, IN LIGHT OF CLEARLY ESTABLISHED LEGAL RULES, COULD BELIEVE THE ACTION TAKEN BY FIRST SERGEANT SMITH WAS LAWFUL, AND HE IS ENTITLED TO QUALIFIED IMMUNITY.

The cross-petitioners contend that although First Sergeant Smith took some action to investigate Trooper Morris' conduct, he should have done more than Patrol policy requires, and is not entitled to qualified immunity from liability.

The law concerning the defense of qualified immunity from liability is well established. Government officials have qualified immunity for discretionary functions so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In determining the availability of qualified immunity, the point of reference is the time at which the action or inaction occurred. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Officers are entitled to qualified immunity when they rely on standard operating procedures, if that reliance is

reasonable. *Vizbaras v. Prieber,* 761 F.2d 1013, 1015 (4th Cir. 1985), *cert. den.* 474 U.S. 1101 (1984).

Patrol policy contains a procedure whereby a citizen can lodge a complaint and it will be forwarded to the Internal Affairs Section to determine the appropriate classification and investigation. The citizen must specify he wishes to file a complaint, although it does not have to be in writing. (J.A. 850-51).

Despite the cross-petitioners' argument to the contrary, there is no Patrol policy requiring a supervisor to file a complaint when the citizen does not wish one to be filed. Therefore, pursuant to Patrol policy, First Sergeant Smith, when informed that Judge Gore and Dennis Worley specified they did not want a complaint filed, did not file one.

Even if policy was violated, First Sergeant Smith would not lose the defense of qualified immunity. Failure to comply with a clearly established administrative policy does not deprive an official of qualified immunity which depends on objective reasonableness of conduct as measured by reference to clearly established constitutional law. *Davis v. Scherer,* 468 U.S. 183, 194 (1984).

The cross-petitioners contend that the Patrol policy "may" be unconstitutional on its face, and First Sergeant Smith is not entitled to qualified immunity for actions consistent with the policy. There is no authority to support the contention that the Patrol policy is unconstitutional nor do the cross-petitioners cite any case. If the cross-petitioners

have no authority that the Patrol complaint policy was unconstitutional, surely First Sergeant Smith was acting reasonably in complying with the policy.

The cross-petitioners have failed to establish a disputed issue of fact regarding whether First Sergeant Smith's actions with respect to investigating Trooper Morris' conduct violated any clearly established constitutional right and, therefore, summary judgment based on qualified immunity was proper. The cross-petitioners have failed to show a split in Circuits or that the lower court decision is inconsistent with any decision of this Court. This issue was correctly decided and does not warrant further review.

III. THIS CASE IS NOT APPROPRIATE TO EXTEND THE PROTECTIONS OF SUBSTANTIVE DUE PROCESS TO CLAIMS BASED ON GOVERNMENTAL ACTION WHICH INCIDENTLY AFFECTS THE FAMILY RELATIONSHIP.

This Court has consistently been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. *Regents of University of Michigan v. Ewing,* 474 U.S. 214, 225-26 (19[illegible]. Under the doctrine of judicial self restraint, this Court has exercised the utmost care when the Court is asked to break new ground in the field of substantive due process. *Collins v. Harker Heights,* 503 U.S. ___, 117 L. Ed. 2d 261 (1992) (42 U.S.C. § 1983 held not to provide remedy for municipal employee's death, because failure to train or warn about known workplace hazards, does not violate Fourteenth Amendment due process

clause.) *Albright v. Oliver,* ___ U.S. ___, 62 U.S.L.W. 4078 (1994) (Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, "that Amendment", not the more generalized notion of substantive due process, must be the guide for analyzing these claims, citing *Graham v. Connor,* 490 U.S. at 395.)

The cross-petitioners are requesting this Court extend substantive due process protection to family members of the deceased when the government action was not directed against them. Should this Court agree with the cross-petitioners, the issue would be moot as the cross-respondents have qualified immunity from liability.

There is no dispute that in 1990, the Fourth Circuit refused to allow a separate substantive due process right for family members against police officers who injured or killed a relative. *Rucker v. Harford County,* 946 F.2d 278, 282 (4th Cir. 1991), *cert. den.* 112 S. Ct. 1175 (1992). The cross-petitioners contend their Fourteenth Amendment rights were violated by the cross-respondents. They must show that right was clearly established law in 1990, or the cross-respondents are entitled to qualified immunity. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

Once a defendant pleads a defense of qualified immunity, the threshold determination is whether the law the defendant is alleged to have violated was clearly established at the time the action occurred. *Siegert v. Gilley*, 500 U.S. ___, 114 L. Ed. 2d 277 (1991).

The cross-petitioners cannot show that the cross-respondents knew or should have known their actions would violate the constitutional rights of the Bowen family. If the constitutional claim was not clearly established at the time the action was taken, an official could not be expected to anticipate subsequent legal developments. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The cross-petitioners cannot meet the threshold requirement to defeat qualified immunity and, therefore, should this Court grant certiorari and agree with the cross-petitioners, they would not be able to proceed with the claim.

This Court has long recognized there are hundreds of cases where the Circuits may disagree yet certiorari is not granted. While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution of the issue in conflict among the Circuits can await a day when the issue is posed less abstractly. *See Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959) (If the resolution of a clear conflict among the Circuits is irrelevant to the ultimate outcome of the case before the court, certiorari may be denied.)

A ruling that does not provide any relief to the prevailing party ignores the duties of federal courts to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions or to declare principles or

rules of law which cannot affect the matter in issue in the case before it." *Boston Firefighters Union, Local 718 v. Boston Chapter N.A.A.C.P., Inc.*, 468 U.S. 1206 (1989), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

Although there are three Circuits which recognize a substantive due process claim[3] when government action incidently affects the family relationship, resolution of such a conflict would have far reaching ramifications involving complex legal and factual determinations. For example: (1) Which family members are entitled to protection? (2) Does the right extend to unborn fetuses, parents, cousins, grandparents? (3) Is it limited to death or is any injury sufficient to warrant a substantive due process claim? The dynamics of the substantive due process claim have not been determined in the three courts which have recognized it. The issue raised by the cross-petitioners does not warrant review in this case.

CONCLUSION

The petition of C.I. Stroud presents a narrow legal issue concerning a federal question where the lower court's decision conflicts with applicable decisions of this Court. The cross-petitioners seek a writ of certiorari of entirely different factual and legal issues which do not warrant review

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[3] *Bell v. City of Milwaukee*, 747 F.2d 1205 (7th Cir. 1984); *Smith v. City of Fontana*, 818 F.2d 1141 (9th Cir. 1987), *cert. den.* 484 U.S. 935 (1987); *Trujillo v. Board of County Commission of City of Sante Fe*, 768 F.2d 1186 (10th Cir. 1985).

by this Court. For the reasons stated, the cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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